

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 CSX TRANSPORTATION, INC.,  
4 Plaintiff

5 v. CIVIL ACTION NO. 05-139 ERIE

6 PORT ERIE PLASTICS, INC.,  
7 Defendant

8 HEARING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT  
9

10 Proceedings held before the HONORABLE  
11 SEAN J. McLAUGHLIN, U.S. District Judge,  
12 in Courtroom C, U.S. Courthouse, Erie,  
13 Pennsylvania, on Monday, March 20, 2006.  
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16  
17 APPEARANCES:

18 CHARLES L. HOWARD, Esquire, appearing on behalf  
19 of the Plaintiff.

RICHARD J. PARKS, Esquire, appearing on behalf

20 of the Defendant.

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 11:05 a.m., on  
4 Monday, March 20, 2006, in Courtroom C.)

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6 THE COURT: First of all, I should extend an  
7 apology, for reasons unclear to me, this argument did not show  
8 up on my calendar this morning. And so like I normally do, I  
9 did not reread these briefs this morning. However, I did read  
10 them at some earlier point in time. But, unfortunately, I'm  
11 not going to be quite as fresh on this as I would normally  
12 like. We have cross-motions for summary judgment here. The  
13 central issue is whether or not Port Erie is responsible for

14 demurrage fees. Who's going to be carrying the water for Port

15 Erie Plastics on your motion?

16 MR. PARKS: I will, your Honor.

17 THE COURT: Do you want to come up to the podium.

18 MR. PARKS: May it please the court, Richard Parks

19 on behalf of Port Erie Plastics, the defendant. What I will

20 address first, your Honor, is the motion by Port Erie Plastics

21 for summary judgment. In this case, as a matter of background,

22 your Honor, Port Erie Plastics --

23 THE COURT: Excuse me, one second. Go ahead.

24 MR. PARKS: In this case, your Honor, Port Erie

25 Plastics is a plastic injection molding company. They entered

3

1 into a contract with NexPak, to produce plastic DVD containers,

2 much as you would buy for any commercial movie that you would

3 buy at a movie store, they made the actual folders that the

4 movie went in. As part of the agreement, your Honor, it's

5 uncontested that NexPak supplied all of the raw materials to

6 Port Erie Plastics. Port Erie Plastics would then warehouse

7 all of the materials -- including the cardboard package for the

8 boxes, as well as the plastic resin that was delivered by rail  
9 cars ultimately by CSX Transportation. In this case, your  
10 Honor, it's uncontested that NexPak retained all legal title to  
11 all the raw materials. And that there's an accounting done on  
12 a just in time inventory basis, wherein, as Port Erie was using  
13 these raw materials, they would get billed by NexPak as they  
14 were billing for manufacturing services. And as a sell off,  
15 and Port Erie would be paid the net for its service, which were  
16 primarily molding, electricity, and some of the machines. It's  
17 important also to note, your Honor, that many of the machines  
18 that were used by Port Erie to mold these items were actually  
19 owned by NexPak at the Port Erie location. Ultimately, NexPak  
20 then in order to supply the resin contracted with BP Amoco.  
21 NexPak went to BP Amoco and would buy the resin, have it  
22 delivered by Union Pacific Railroad, which was then transferred  
23 to plaintiff in the case, which would deliver it to the  
24 Montfort terminal. At no time did Port Erie control the status  
25 of the bills of lading. The waybills were never known to them,

1 nor were they ever in direct receipt of the railroad shipments.

2 They did for NexPak make arrangements with Presque Isle  
3 Trucking to have the rail cars unloaded and then paid for the  
4 trucks by Presque Isle Trucking to deliver the NexPak resin to  
5 Port Erie's silos. They did not take title of the resin. And  
6 they did not at anytime assume the delivery charges. In  
7 fact --

8 THE COURT: There are a lot of facts flying here, a  
9 lot of which are really not in dispute. Cutting to the legal  
10 chase here, your position is, as I understand it, is under  
11 Third Circuit law, the name of the case is escaping me --

12 MR. PARKS: Union Pacific v. Ametek?

13 THE COURT: Yes. That fundamentally an entity is  
14 not a party to a shipping contract and cannot be liable for  
15 demurrage fees, that is the essence of your legal position?

16 MR. PARKS: That's the essence of our legal  
17 position, yes.

18 THE COURT: Now, although, the memory is somewhat  
19 dimmer than I would prefer it to be, I do have a recollection  
20 that there is a document in the record that designates Port  
21 Erie as the consignee, is that right?

22 MR. PARKS: There's one bill of lading we were able

23 to obtain that did have Port Erie as the ship to/consignee.

24 THE COURT: Of course, if you are a consignee, I

25 mean all other things being equal, if you are in fact a

5

1 consignee, then you may be -- you may, underline may, be liable

2 for demurrage fees, is that right?

3 MR. PARKS: If we are a legal consignee, yes.

4 THE COURT: Now, before we decide whether you are or

5 you are not or there is a material issue of fact as to whether

6 you are -- what is required to transform an entity into a

7 consignee?

8 MR. PARKS: The elements of a contract. Consent,

9 consideration, in other words, a mutual agreement and

10 consideration exchanged between the parties.

11 THE COURT: On what form, on what "shipping" form

12 does your client's name appear as the consignee?

13 MR. PARKS: On the bill of lading that was produced

14 solely by BP Amoco, it's the only place.

15 THE COURT: Tell me again where BP Amoco fits in the

16 shipping food chain?

17 MR. PARKS: Amoco, BP Amoco was the seller and

18 shipper of these rail cars that were ordered by NexPak.

19 THE COURT: Okay. Now, what did discovery -- I

20 presume if it would have been developed anywhere, it would be

21 at deposition, what did discovery reveal as to how and why your

22 client's name ended up on this bill of lading?

23 MR. PARKS: As a shipping address, the place where

24 NexPak was going to get its DVD boxes molded.

25 THE COURT: So Amoco would have, somebody on behalf

6

1 of Amoco would have inserted your client's name and description

2 as consignee on the document, is that it?

3 MR. PARKS: That is correct.

4 THE COURT: Were you able to track down the person

5 who did that?

6 MR. PARKS: We were not.

7 THE COURT: All right.

8 MR. PARKS: Unfortunately, there's been an

9 outsourcing of all of these people with the railroads and with

10 BP.

11 THE COURT: Did anybody from Amoco have an

12 explanation, even if it wasn't the person that did it, as to

13 why that was done?

14 MR. PARKS: The only -- I had a conversation, one

15 conversation with a person --

16 THE COURT: We're talking about on the record?

17 MR. PARKS: No, there is nothing on the record from

18 BP whatsoever. Except for this bill of lading.

19 THE COURT: Well, is there a material issue of fact

20 as to whether or not -- there was a "contract" with all of its

21 constituent elements insofar as your apparent written

22 designated status as consignee is concerned?

23 MR. PARKS: I do not believe there is, your Honor,

24 because of the deposition taken of a CSX designated employee.

25 THE COURT: What did that 30(b)(6) deponent say?

7

1 MR. PARKS: The deposition of John Underwood taken

2 on February 2, 2006, your Honor -- I'm reading from page 70 of

3 the transcript -- "do you have any evidence" --

4 THE COURT: Remember, you got to read a little



5 slower for him.

6 MR. PARKS: "Do you have any evidence of or writing  
7 that would show there is a contract between CSX and Port Erie  
8 Plastics? Answer: No, sir. Question: Do you have any  
9 contracts where CSX is a party to a shipping contract with BP  
10 that is relevant to Port Erie Plastics issue? Answer: No,  
11 sir. Question: Do you have any evidence or anything that  
12 would indicate that Port Erie Plastics was a party to any  
13 shipping contract with any party concerning these particular  
14 rail cars? Answer: None that I'm aware of, excuse me, none  
15 that I know of," I did misquote that.

16 THE COURT: Maybe he just didn't, I just ask  
17 rhetorically, maybe he didn't know of that one document?

18 MR. PARKS: But he was aware of it, your Honor. The  
19 only other testimony concerning the placement of Port Erie  
20 Plastics is the unrefuted testimony of the three Port Erie  
21 Plastics employees who said we didn't know there was a  
22 consignee until after he started sending us invoices.

23 THE COURT: Let me ask you this. With respect to --  
24 it was the bill of lading that your name appears on as  
25 consignee?

1 MR. PARKS: Yes.

2 THE COURT: Relative to this transaction that  
3 generated this lawsuit, how many separate bills of lading were  
4 there or was there just one?

5 MR. PARKS: There should have been one for each rail  
6 car. There was only one found anywhere that I'm aware of.

7 THE COURT: Now, you would have received, you  
8 meaning your client, in the normal course of business, would  
9 have received a copy of the bill of lading, wouldn't you?

10 MR. PARKS: We should, we did not. It's  
11 uncontroverted that we did. Mr. Bartosik, who testified for  
12 Presque Isle Trucking, said that they never gave us notices of  
13 any bills of lading for anything they would have received --

14 THE COURT: Is your theory since you never received  
15 a copy that at least in written form reflected your status as  
16 consignee, you never had any opportunity to object to it?

17 MR. PARKS: Yes.

18 THE COURT: Now, whether one's a party or a  
19 consignee or whatever, in this particular situation is it  
20 accurate to say that your mere status as a party or consignee

21 under CSX's tariff would not entitle CSX to impose demurrage  
22 fees unless the entities against whom they were going to impose  
23 those fees had received constructive notice?

24 MR. PARKS: Actual constructive notice of placement.

25 THE COURT: What is your theory on that?

9

1 MR. PARKS: The theory is, your Honor, under their  
2 tariff, tariffs as a matter of law are to be strictly read.  
3 Under the theory of tariff, it requires actual notice of the  
4 placement of a rail car.

5 THE COURT: Is that 48 hours advanced notice, what  
6 is it?

7 MR. PARKS: The way I read this tariff, your Honor,  
8 is actual notice within and then you get 48 hours to unload,  
9 once they provide actual notice.

10 THE COURT: What is the state of the record as to  
11 your client's receipt of actual notice with respect to any of  
12 the cars?

13 MR. PARKS: None. They have admitted within their  
14 briefing finally or initially they said of record we had

15 received all constructive notices. Then they came back and  
16 said no, we didn't receive notices, we gave it to our agent,  
17 Presque Isle Trucking. So there is no direct notice under the  
18 tariff on Port Erie Plastics anywhere on the record.

19 THE COURT: All right, let me hear from Mr. Howard.

20 MR. HOWARD: May it please the court, I'm Charles  
21 Howard from Philadelphia, and I represent CSX in this matter.

22 THE COURT: Shall we start and let's work backwards.

23 MR. HOWARD: Okay.

24 THE COURT: Let's assume, only for purposes of the  
25 following discussion, that as a matter of fact or law, Port

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1 Erie is a party to the contract. Now, a party's status to a  
2 contract in and of itself, if I understand it correctly, won't  
3 entitle you, meaning CSX, to subject them to demurrage fees  
4 unless you satisfied the requirements of your tariff insofar as  
5 notice is concerned, is that correct?

6 MR. HOWARD: That is correct, your Honor.

7 THE COURT: All right. Focusing only on the 48 hour  
8 notice requirement in the tariff, is there any record evidence

9 here from which a fact finder could conclude that such notice  
10 had been given to Port Erie?

11 MR. HOWARD: Directly to Port Erie or to Port Erie?

12 THE COURT: Well, in whatever capacity you believe  
13 that legally Port Erie would have received it?

14 MR. HOWARD: Port Erie received constructive  
15 placement notice -- of all the rail cars at issue in the case,  
16 when CSX sent constructive placement notices to Port Erie's  
17 agent, Presque Isle Trucking.

18 THE COURT: Now, refresh my recollection, what did  
19 Presque Isle Trucking do?

20 MR. HOWARD: Presque Isle Trucking is a common  
21 carrier, they had been hired by Port Erie to go to the Montfort  
22 terminal where CSX rail cars were parked. Presque Isle would  
23 unload the rail cars into one of their trucks and then take the  
24 material from the Montfort terminal -- to the Port Erie  
25 facility in Harborcreek.

11

1 THE COURT: This is the outfit that actually did the  
2 off loading?

3 MR. HOWARD: Yes, your Honor.

4 THE COURT: So the theory there is if their agent  
5 got it, the principal got it?

6 MR. HOWARD: It's a little more involved than that,  
7 your Honor. When CSX first became aware of these shipments,  
8 that it was going to be the carrier with these goods into Erie,  
9 yet had the bills of lading in front of it that identify,  
10 excuse me, Port Erie as consignee, as the designation carrier.

11 THE COURT: You said it had the bills of lading in  
12 front of it, you mean CSX?

13 MR. HOWARD: CSX had the bills of lading that had  
14 been sent by Union Pacific Railroad, the origin carrier.

15 THE COURT: And you said the bills of lading  
16 identified Port Erie as consignee?

17 MR. HOWARD: For each rail car at issue, yes, your  
18 Honor.

19 THE COURT: Where are those bills of lading, are  
20 they of record?

21 MR. HOWARD: Exhibit G to our statement of facts in  
22 support of its motion for summary judgment. We subpoenaed the  
23 Union Pacific Railroad and for them to produce the EDI or

24 electronic data interchange bills of lading for these

25 shipments. And Exhibit G is the total of their production.

12

1 THE COURT: Being somewhat unfamiliar with this

2 industry, is there a separate bill of lading for every rail

3 car?

4 MR. HOWARD: Yes, your Honor, there is.

5 THE COURT: And so you, through your subpoena, you

6 were able to obtain electronic evidence, if you will, of Port

7 Erie being designated as consignee for each of the railroad

8 cars?

9 MR. HOWARD: On each of the railroad cars at issue,

10 yes, your Honor.

11 THE COURT: Who does the record reflect would have

12 so designated them?

13 MR. HOWARD: The record I don't believe reflects who

14 would --

15 THE COURT: How does one become, I don't want to use

16 the term branded, but in this case it does have an economic

17 implication potentially -- where does it come from?

18 MR. HOWARD: Would either be the origin carrier,  
19 which is Union Pacific or the shipper, BP Amoco, or between the  
20 two of them, would have decided that Port Erie was the  
21 consignee.

22 THE COURT: Now, do you disagree with Mr. Parks that  
23 at the end of the day you can't, you meaning an entity, does  
24 not become a consignee any more than an entity becomes an oak  
25 tree simply by someone else's fiat without an agreement to be

13

1 so?

2 MR. HOWARD: There does not have to be an expressed  
3 agreement, your Honor. The mere acceptance of goods -- by Port  
4 Erie makes them in fact substantively consignee in this matter.  
5 Not only is the designated consignee on the bill of lading,  
6 they could be consignee in fact by accepting the goods. And we  
7 cited the cases.

8 THE COURT: Put aside the acceptance at the other  
9 end of the line, which makes them I guess in your view a  
10 constructive consignee and focus only on -- you're not telling  
11 me, are you, the fact that their name appears on a document or



12 documents, is dispositive of the issue of their consignee

13 status?

14 MR. HOWARD: I have found no cases that said that an

15 entity designated as the consignee on the bill of lading is not

16 liable for demurrage. I don't believe anything --

17 THE COURT: What if it's a mistake?

18 MR. HOWARD: If it's a mistaken consignee,

19 mistaken -- such as to refuse acceptance of goods at

20 designation. If it does refuse acceptance of goods at

21 destination, it has no liability --

22 THE COURT: What if the purported consignee never

23 had notice it was designated on the bill of lading, they say

24 they never were aware of it, they say they never were aware of

25 that, I'm saying the record reflects that they were aware they

14

1 were the designated consignee on those various railroad cars?

2 MR. HOWARD: If they refused acceptance of goods at

3 destination, then they would have no liability.

4 THE COURT: Now, your position is even if they

5 weren't designated as the consignee on the documents, they

6 nevertheless under the facts of this case were because they

7 accepted the shipments, is that it?

8 MR. HOWARD: That's what the case law says, your

9 Honor, that's our position.

10 THE COURT: Tell me how they accepted, tell me what

11 critical things -- what was the conduct in this case of Port

12 Erie that constituted acceptance so as to render them liable

13 for the demurrage fees?

14 MR. HOWARD: Port Erie knew they designated Presque

15 Isle as its agent -- on the constructive placement notices.

16 Presque Isle would only bring the resin from the Montfort

17 terminal to Port Erie's facility when instructed to do so by

18 Port Erie. Had there been no instructions, there would be no

19 delivery of resin to Port Erie.

20 THE COURT: Was Port Erie a party to the shipping

21 contract?

22 MR. HOWARD: Port Erie was a consignee under the

23 case.

24 THE COURT: That's a different question, I'm asking

25 a different question now. Were they a party to the contract?

1 MR. HOWARD: They were not involved in the original  
2 negotiations for freight transportation service between -- I  
3 have no evidence they were involved between BP Amoco and Union  
4 Pacific.

5 THE COURT: So the record will be clear when I go  
6 back and read this, it would be accurate to say that CSX  
7 Transportation's theory as against Port Erie, not that they're  
8 liable as a party to the contract and in classic sense like  
9 that Third Circuit case, because you have no evidence that they  
10 were a party, your position is, I don't want to oversimplify  
11 it, although they're not a party, they're liable as a  
12 consignee?

13 MR. HOWARD: Yes, your Honor.

14 THE COURT: Pure and simple?

15 MR. HOWARD: As Mr. Parks accurately pointed out,  
16 CSX has no record of any contract that it had with PEP, which  
17 would make PEP liable for demurrage under the contract. It was  
18 because of its contracts and its assignment of consignee.

19 THE COURT: Is either party entitled to summary  
20 judgment in this case or are there material issues of fact?

21 MR. HOWARD: CSX does not believe there are material

22 issues of fact, we believe CSX is entitled to summary judgment.

23 THE COURT: Let me hear back from Mr. Parks. Let's

24 start in the same place I started with your opposing counsel.

25 He says you received notice, actual notice under the tariff

16

1 because your agent received notice and, therefore, that's

2 legally your notice, what's wrong with that theory?

3 MR. PARKS: The theory is flawed because there was

4 no agency or permission given as between Port Erie Plastics and

5 Presque Isle Trucking to act as an agent to receive notice.

6 There is no evidence whatsoever on the record of that until

7 after discovery closed. There is an affidavit of Mr. Graham,

8 who now asserts --

9 THE COURT: Who is Mr. Graham?

10 MR. PARKS: Mr. Graham is a party that was not

11 designated as a 30(b)(6) deponent, who ends up being an affiant

12 stating that Mr. Witkowski from Port Erie Plastics had

13 specifically told him to send the notices to Presque Isle

14 Trucking.

15 THE COURT: Then, for goodness sake, that's an issue

16 of material fact on that point?

17 MR. PARKS: As to agency absolutely. There is a  
18 counteraffidavit specifically contrary to each other, your  
19 Honor.

20 THE COURT: Of course, in order to be an agent,  
21 there's a couple kind of agents -- there's apparent authority,  
22 there's implied authority. You could theoretically be on the  
23 hook under apparently authority, couldn't you?

24 MR. PARKS: If there's some sort of apparent  
25 authority, yes. But there wasn't, we don't believe.

17

1 THE COURT: All right. So now address his other  
2 point and that is that even though you may not be liable as a  
3 party, original party to the shipping contract, you  
4 nevertheless accepted the goods and you are de facto a  
5 consignee, what's wrong with that theory?

6 MR. PARKS: It's contrary to the law.

7 THE COURT: What's your understanding of the law and  
8 how it is at odds with Mr. Howard's view?

9 MR. PARKS: As we assert, your Honor, we were

10 warehousing NexPak's raw material, we did receive it, and it  
11 wasn't ours. We were the warehouseman for that under this  
12 letter, that's not in dispute. The facts aren't in dispute  
13 about when the plastic was paid for and it was delivered, so  
14 that we were accepting it for NexPak. The title and beneficial  
15 interest of the shipment was retained only between BP and  
16 NexPak.

17 THE COURT: Is lack of title ownership to a  
18 commodity that is moving in commerce -- is that fatal to that  
19 party's status, in other words, to be a consignee, must you  
20 have a legal or beneficial interest in the material that's  
21 being shipped?

22 MR. PARKS: Under the Middle Atlantic case, your  
23 Honor --

24 THE COURT: Where does that come from?

25 MR. PARKS: It comes from the legal consignee and

1 who is the beneficiary of those services as determined by the  
2 case law. Both by the Third Circuit and the Union Pacific v.  
3 Ametek case, cited within that, which is Middle Atlantic.

4 Which make a designation between a consignee and a legal  
5 consignee. And you do have to look into what was a legal  
6 consignee. And there has to be some contract connection to  
7 that. Not just --

8 THE COURT: I don't understand what you mean. What  
9 is the difference between a legal consignee and a consignee?

10 MR. PARKS: A consignee, as you stated before, your  
11 Honor, anybody can put your name on a bill of lading as  
12 consignee. And I will point out, your Honor, that the  
13 representation at Exhibit G was the bill of lading is  
14 incorrect. It is the waybill that is produced, I understand it  
15 is purely between Union Pacific and CSX, not by BP. So what is  
16 referred to as the bill of lading is actually a waybill.

17 THE COURT: I don't know what a waybill is, but  
18 somebody on more than one occasion thought you were a  
19 consignee?

20 MR. PARKS: Well, put the ship to/consignee on this  
21 bill of lading, yes.

22 THE COURT: Just looking at the practicalities of  
23 this thing, your agent, Presque Isle Shipping --

24 MR. PARKS: Presque Isle Trucking.

25 THE COURT: Presque Isle Trucking. They go get the

19

1 stuff and unload it at your direction, is that right?

2 MR. PARKS: No. It was delivered to them, they are  
3 the owner of the Montfort terminal. CSX delivered directly to  
4 them, not to Port Erie. They took their trucks and delivered  
5 it to a silo.

6 THE COURT: They deliver it right to them and then  
7 they take it off, right?

8 MR. PARKS: Correct, they empty the cars.

9 THE COURT: Do you tell them when to take it off?

10 MR. PARKS: Yes. Well, actually, NexPak will tell  
11 us to get specific cars unloaded.

12 THE COURT: I'm not saying this is necessarily of  
13 any legal moment, but the last two entities involved in this  
14 before the material gets taken off the train, it is you and  
15 Presque Isle, right?

16 MR. PARKS: Yes.

17 THE COURT: Now, if you had any ownership interest  
18 in those widgets that are being taken off under this scenario



19 and by your understanding of the state of the law, you would be

20 a consignee, is that right?

21 MR. PARKS: That's my understanding. Then we would

22 be a party to the contract, yes.

23 THE COURT: Is there such, if you're not a

24 consignee -- let's put it this way. If you are a consignee,

25 must you be a party to the contract?

20

1 MR. PARKS: I believe, yes. I believe that's what

2 the case law states. And I think the holding --

3 THE COURT: But you can be a party to a contract but

4 not be a consignee, right?

5 MR. PARKS: You could have an interest in the

6 contract. I don't know how you would do that, your Honor.

7 THE COURT: I don't know, either.

8 MR. PARKS: I think you would be a third-party

9 beneficiary.

10 THE COURT: In any event, this Mid Atlantic case is

11 a Third Circuit case?

12 MR. PARKS: No, it's out of Illinois.

13 THE COURT: Is it a circuit case or a district court

14 case?

15 MR. PARKS: District court case.

16 THE COURT: About 1972?

17 MR. PARKS: Hold on a second. Middle Atlantic

18 Conference v. United States, district court, 1972. Looks like

19 a district DC, 1972. 353 F.Supp. 1109. And it was cited

20 within the Union Pacific v. Ametek case.

21 THE COURT: You believe that case stands for the

22 proposition that you cannot be a consignee unless you have

23 ownership interest in the material that is moving?

24 MR. PARKS: Specifically they were discussing the

25 liabilities for consignment and demurrage for warehousing, yes.

21

1 THE COURT: Isn't consignee a term of art that is

2 defined under the regulations?

3 MR. PARKS: I don't see it defined specifically. If

4 it is, it's been modified by case law. In Middle Atlantic they

5 were talking about warehouseman and other parties in possession

6 without the owner --

7 THE COURT: Who was the consignee if not you?

8 MR. PARKS: The consignee was NexPak, no doubt about

9 that, they were the party that held all the interest in the

10 plastic. They're listed as the buyer on the bill of lading.

11 There's no doubt it's NexPak.

12 THE COURT: So when all is stripped away here, your

13 position is that the notice, constructive notice, doesn't have

14 to be actual or constructive?

15 MR. PARKS: It has to be actual notice.

16 THE COURT: You say there is a disputed issue of

17 material fact on that issue?

18 MR. PARKS: Correct.

19 THE COURT: On the other issue, you say that your

20 position, boiled down to its essence, is you cannot be a

21 consignee because you did not own the shipment?

22 MR. PARKS: Or have another beneficial interest in

23 the plastic.

24 THE COURT: What would be another beneficial

25 interest that would qualify?

1 MR. PARKS: If we had somehow --

2 THE COURT: You had a beneficial interest in this  
3 case in this sense, that you were working on the widgets for  
4 profit?

5 MR. PARKS: Yes.

6 THE COURT: Isn't that a beneficial interest?

7 MR. PARKS: Again, it was the way our contract was  
8 structured. So, no, I don't think they have a beneficial  
9 interest. We clearly could have bought the material ourselves  
10 and raised the price to Port Erie, excuse me, to NexPak.  
11 In fact, your Honor, it is uncontested in the case that the  
12 shipments that were on there way -- had actually been delivered  
13 to the Montfort terminal, were diverted to other NexPak plants  
14 in Canton and Atlanta, Georgia. So NexPak always exercised,  
15 through the delivery at the Montfort terminal, exercised  
16 control over that plastic. And when NexPak went bankrupt, BP  
17 stopped the delivery of the plastic on, I believe it was three  
18 or four cars that were actually in the Montfort terminal.

19 THE COURT: All right, I'll give Mr. Howard one more  
20 opportunity.

21 MR. PARKS: If I might, there is one other question  
22 of fact I do wish to point out. In this case, your Honor,

23 they've asserted damages of \$127,000. They they've also put of  
24 record, I think improperly, but it does impeach themselves, a  
25 letter dated September 23, 2003, to Mr. Witkowski offering to

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1 settle this dispute. It's important to note that when you look  
2 at this --

3 THE COURT: Mr. Witkowski being a representative of?

4 MR. PARKS: He's the purchasing manager of Port Erie

5 Plastics. At this time the dispute had already arisen --

6 they had an outstanding demurrage bill of \$85,000, that's as

7 September 23, 2003. They attach an alleged statement of

8 account that is dated well after September of 2003, and has one

9 invoice after September 23, 2003, of \$2,700 in October of 2003.

10 And yet their bill says \$127,000, not \$85,000.

11 THE COURT: What are you saying, it's inflated by

12 \$40,000?

13 MR. PARKS: Exactly. Their own records have two

14 different statements of what was owed. It's also a question of

15 fact. Your Honor, thank you.

16 MR. HOWARD: Your Honor, do you have some questions

17 or should I just respond?

18 THE COURT: Go ahead.

19 MR. HOWARD: I'd like to address the disclosure of  
20 William Graham, who executed an affidavit on behalf of CSX  
21 concerning the agency relationship. Mr. Graham was disclosed  
22 to Port Erie, its counsel, the morning of Mr. Underwood's  
23 deposition, during Mr. Underwood's deposition. It was not the  
24 result of disclosure after discovery closed. We address that  
25 in one of the briefs as well.

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1 THE COURT: It certainly appears to indicate a  
2 material issue of fact to me on the question of notice.

3 MR. HOWARD: It's not provided by any record  
4 evidence. I'm not aware of any statement in the record, either  
5 through affidavit or otherwise, that contradicts what Mr.  
6 Graham says.

7 THE COURT: Let me make sure we're talking about the  
8 same thing. He says there are dueling affidavits or dueling  
9 affidavit and a deposition, as to whether or not Port Erie  
10 Plastics authorized, if you will, Presque Isle Trucking to be

11 their agent for purposes of accepting notice. If I remember  
12 the name correctly, he says I believe Mr. Witkowski filed an  
13 affidavit in this case?

14 MR. HOWARD: Yes, Mr. Witkowski did file an  
15 affidavit.

16 THE COURT: To the extent they did not do that. And  
17 you have testimony from whom that would rebut that?

18 MR. HOWARD: William Graham's affidavit is attached  
19 to our motion, he was charged with the responsibility --

20 THE COURT: William Graham is from?

21 MR. HOWARD: CSX.

22 THE COURT: Go ahead.

23 MR. HOWARD: He was charged with the responsibility  
24 of creating a customer profile for Port Erie Plastics when  
25 their business came to CSX. He has a bill of lading in front

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1 of him, it identified Port Erie Plastics as a consignee. He  
2 has to contact them to find out how this delivery is going to  
3 be made. In some instances CSX can put the rail car right at  
4 the customer's site. He had found out who he was going to

5 contact on behalf of CSX when the rail cars arrived in Erie at  
6 the CSX yard. So according to Mr. Graham, he had a telephone  
7 conversation with Mr. Witkowski back in late 2001, which is  
8 several months before the demurrage bill was sent out. As a  
9 result of that conversation or series of conversations that he  
10 had with Mr. Witkowski, he was instructed that when the rail  
11 cars arrived in Erie, Presque Isle Trucking was to receive the  
12 constructive placement notice.

13 THE COURT: But they dispute that, don't they?

14 MR. HOWARD: Mr. Parks disputes it. But I do not, I  
15 missed it if it's in the Witkowski affidavit -- I don't believe  
16 it's there.

17 THE COURT: Is it there?

18 MR. PARKS: I'm reading from the original, your  
19 Honor. "At no time did I ever instruct or imply to William  
20 Graham or anyone at CSX Transportation -- designated by Port  
21 Erie to receive CSX paperwork on behalf of Port Erie as Port  
22 Erie's agent relative to the shipments in question. At no time  
23 did William Graham inform Port Erie as designated consignee to  
24 shipments in question." Signed by Witkowski.

25 THE COURT: Does that tee up an issue of fact?



1 MR. HOWARD: I stand corrected, your Honor. I stand  
2 corrected in light of that affidavit, there is an issue of  
3 fact.

4 THE COURT: All right. Now, let's go back to the  
5 other part. His position very simply on consignee status is  
6 that as a matter of law you can't be a consignee if you don't  
7 have legal or beneficial interest in the property. I think  
8 that's their whole position, isn't it?

9 MR. HOWARD: Yes, the Supreme Court of the United  
10 States addressed that in the Railroad v. Fink case in 1991.  
11 We cite that in our brief.

12 THE COURT: That's an oldie but goody?

13 MR. HOWARD: Doesn't matter, a lot of this law is  
14 old but still good.

15 THE COURT: What does the Supreme Court say  
16 pertinently on the point -- you tell me, what do they say on  
17 the point?

18 MR. HOWARD: In the Fink case the issue is whether a  
19 consignee or receiver of goods should have to pay a full tariff

20 rate. He had paid for the freight when it arrived at the  
21 destination. The carrier came back later and said I paid the  
22 rate but I didn't pay the full tariff rate. That's back in the  
23 days of the rate doctrine when carriers were entitled or  
24 required to charge full tariff rate. The defendant alleged  
25 that because he didn't become the owner of the goods until

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1 after the goods had been delivered to him, he had no liability  
2 as consignee. The Supreme Court said there is no proof such  
3 agreement was known to the carrier, nor could that fact lessen  
4 an obligation of the consignee to pay the legal tariff rate  
5 when he accepted the goods. It didn't matter.

6 THE COURT: Did he acquire title to the goods after,  
7 at some point in the process?

8 MR. HOWARD: Not after he had received the goods,  
9 according to the facts reported in the case.

10 THE COURT: He had a beneficial owner interest in  
11 them or something, didn't he, he had an expectancy he would  
12 acquire an ownership interest?

13 MR. HOWARD: I assume that's the case, yes.

14 THE COURT: Doesn't that case arguably cut against

15 you then?

16 MR. HOWARD: Same expectancy interests exists in

17 this case. The ownership transferred to Port Erie Plastics

18 when the goods were put into title.

19 THE COURT: There's a difference between ownership

20 and possession, you can process something and not have title,

21 beneficial or otherwise to them, right?

22 MR. HOWARD: In the Fink case the owner took

23 ownership possession. In the Port Erie Plastics case, Port

24 Erie takes ownership upon its possession of goods in the silo.

25 THE COURT: Now we're getting to it then. You're

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1 equating physical possession with legal title?

2 MR. HOWARD: Actually, I'm addressing ownership as

3 it was addressed by the court.

4 THE COURT: Is possession synonymous with ownership

5 under railroad law?

6 MR. HOWARD: I don't know, your Honor.

7 THE COURT: But did Port Erie do anything other

8 than -- we know Port Erie, perhaps through its agent,

9 possessed -- well, we know they possessed the material because

10 they worked on it, right?

11 MR. HOWARD: Yes, your Honor.

12 THE COURT: By virtue of that physical possession

13 and making these widgets into something else, if you will, is

14 it that possession that makes consignee status possible for

15 them?

16 MR. HOWARD: No. Consignee status is because they

17 were on the bill of lading as such and because they accepted

18 the goods. Exhibit C to Port Erie's initial brief. It's a

19 letter from Jim Witkowski to Jeff Calderone, materials manager

20 at NexPak, dated July 13, 2002. Witkowski writes "I just

21 wanted to confirm my understanding of the arrangement we have

22 in place with regards to the shipment of resins to Port Erie

23 Plastics since the situation is a little unique. We will be

24 operating with the understanding that ownership of the resin

25 will not transfer to Port Erie until the material is delivered

1 to our facility in Harborcreek, PA. Therefore, ownership and

2 all risk of loss will remain with NexPak, and/or shipping  
3 companies, while the resin is in transit and/or in storage at  
4 the Plastek storage facility." Which was the Montfort  
5 facility.

6 THE COURT: All right. So your point is Witkowski,  
7 on behalf on Port Erie, said once we get it in our plant --

8 MR. HOWARD: It's ours.

9 THE COURT: What do you say, it sure sounds like it  
10 says that?

11 MR. PARKS: The actual receipt, as I stated  
12 previously, your Honor, when the plastic was pulled out, the  
13 deposition transcript showed how it actually worked.  
14 Basically, they would as an offset, account for all the raw  
15 materials as part of their invoices when they molded and worked  
16 with -- these DVD holders. So, eventually, yes on paper the  
17 plastic resin was accounted for and set off against the final  
18 labor product.

19 THE COURT: Then you owned it?

20 MR. PARKS: At the very end after it was worked on.

21 THE COURT: Are you saying that that ownership came  
22 too late in the shipping process?

23 MR. PARKS: Yes. That had nothing to do with

24 shipment, your Honor. That was warehouseman and, again, that's  
25 what the Mid Atlantic and Ametek cases specifically address.

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1 THE COURT: You got about two minutes.

2 MR. HOWARD: Neither Ametek nor Middle Atlantic  
3 addressed the situation involving -- people for whom these  
4 carriers were seeking demurrage, and had the name of the  
5 consignee on the bill of lading. That's an easy way to  
6 distinguish our case.

7 THE COURT: What is your damage claim?

8 MR. HOWARD: \$127,000.

9 THE COURT: Could you briefly address his point that  
10 he thinks it's about eighty-some thousand dollars?

11 MR. HOWARD: The bills we have produced in discovery  
12 and that we've attached to our motions, when added up, come to  
13 \$127,000 and change. There at one point I believe Mr. Parks  
14 mentioned it was 115,000.

15 MR. PARKS: Eighty-five.

16 MR. HOWARD: That obviously is inaccurate. The  
17 bills we produced and put into the record was 115 for all

18 demurrage and the remainder for liquidated damages.

19 THE COURT: Anything else you want to tell me on one  
20 last point?

21 MR. HOWARD: Mr. Parks characterized the material  
22 that was produced by Union Pacific as the waybills. I think it  
23 would be clear if the court looks at Exhibit G --

24 THE COURT: What's a waybill, I have no idea?

25 MR. HOWARD: A waybill was the document that is a

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1 CSX internal document, CSX would have created internally upon  
2 its receipt of the bills of lading from Union Pacific. Our  
3 subpoena of Union Pacific specifically asks for the bill of  
4 lading. We've attached an affidavit from Union Pacific the  
5 person who responded to the subpoena, he refers to them as  
6 bills of lading. We asked for the bills of lading, they're not  
7 waybills. They're copies of the electronic bills of lading  
8 that control the shipments at issue.

9 THE COURT: Thank you, sir. Is there a jury trial  
10 demand in this case?

11 MR. PARKS: No.

12 THE COURT: All right. Let's go off the record.

13 (Discussion held off the record.)

14 THE COURT: Just so the record is clear, Mr. Howard  
15 is going to get back to us in the next few days just to confirm  
16 his client's willingness in having this matter submitted  
17 temporarily to the magistrate judge for a settlement conference  
18 inasmuch as it's a non-jury case. In the meantime against the  
19 possibility that that green light is a likelihood, I will talk  
20 to her as soon as we hear from Mr. Howard, then we'll get back  
21 to you with a date. But as I said before, I strongly encourage  
22 you to get this thing resolved.

23 (Whereupon, at 11:55 a.m., the proceedings were  
24 concluded.)

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1 CERTIFICATE

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4 I, Ronald J. Bench, certify that the foregoing is a

5 correct transcript from the record of proceedings in the



6 above-entitled matter.

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12 Ronald J. Bench

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